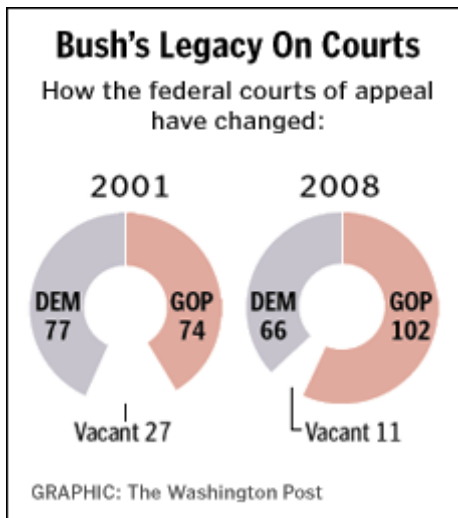


The Politics of the Federal Bench

GOP-Appointed Majorities Winning Ideological Battles at Appellate Level



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CINCINNATI -- In June 2005, two federal appellate judges here ordered Joseph Arnold released from a 21-year prison sentence after ruling that there was no credible evidence he had threatened to shoot his girlfriend's daughter with a pistol.

But Arnold's relief was fleeting. Prosecutors appealed to all of the judges on the [U.S. Court of Appeals](#) for the 6th Circuit. And the full court, dominated by appointees of [President Bush](#) and other Republican presidents, reversed the initial appellate ruling, saying the evidence presented by prosecutors was sufficient to merit Arnold's conviction.

Other criminal defendants, including some on death row, remain in federal prisons for the same reason: After initial appellate verdicts that their convictions or sentences were unjust, the last word came from Bush's judicial picks on the 6th Circuit. Acting in cooperation with other Republican appointees on the court, they have repeatedly organized full-court rehearings to overturn rulings by panels dominated by Democratic appointees.

Although the impact of Bush's judicial appointments is most often noticed at the Supreme Court, it has played out much more frequently and more importantly here and in the nation's 12 other appellate courts, where his appointees and their liberal counterparts are waging often-bitter ideological battles. After Bush's eight years in office, Republican-appointed majorities firmly control the outcomes in 10 of these courts, compared with seven after President [Bill Clinton](#)'s tenure. They also now share equal representation with Democratic appointees on two additional courts.

Although exceptions exist, of course, independent legal scholars say Bush's picks in particular have been more likely than Democratic appointees to uphold the positions of police and prosecutors, and less likely to alter verdicts because of procedural and legal mistakes in handling defendants.

Under 6th Circuit rules, full court, or "en banc," hearings are allowed in order to ensure "uniformity of the court's decisions" when separate panels of three randomly appointed judges disagree, or when questions of "exceptional importance" are at stake. But some of the court's Democratic appointees allege that the Republican-appointed majority is grabbing and reversing cases whenever those judges disapprove of the social consequences of the Democratic appointees' rulings.

"Anytime two of us show up on a panel and they don't like it, they yank it," said one Democratic-appointed judge on the circuit, who spoke on the condition of anonymity to avoid directly provoking colleagues.

That may be only a slight exaggeration, according to a [Washington Post](#) review of all of the circuit's en banc rulings in the past decade. In the past five years, initial verdicts by panels dominated by Democratic appointees were clearly reversed by Bush's appointees and other Republican picks 17 times, out of 28 decisions issued by the full court.

In these cases, the majority upheld death sentences, ruled that the courts could rely on evidence that some justices said was tainted, declared that certain prisoners were not entitled to the appointment of counsels, rejected several constitutional claims, upheld a Bush administration regulation, ruled that disability payments were unwarranted, and refused several requests for criminal retrials.

Ideological trench warfare is frequently on display in the 6th Circuit's austere fourth-floor hearing room in the Potter Stewart Courthouse here, which shifted to Republican-appointee control in mid-2005. Rulings sling around words such as "absurd," "rash," "meritless," "Pollyannaish," "unconscionable," "careless," "overwrought" and "alarming" -- from jurists on each side, directed at the judgments of colleagues appointed by the other political party. Tensions between Democratic and Republican appointees have become so intense that they no longer regularly lunch together at the city's University Club.

Chief Judge Danny Boggs, an appointee of President [Ronald Reagan](#) and member of the U.S. Judicial Conference's executive committee, said Republican and Democratic appointees across the nation "on average" have looked at criminal and employment-related cases differently. He said, however, that party affiliation is not uniformly predictive, noting that he has occasionally sided with Democratic appointees and that most rulings by three-judge panels are unanimous.

Others see a sharp divide. Boyce Martin, an appointee of President [Jimmy Carter](#) who was Boggs's predecessor as chief judge, has complained in dissents, for example, that the new majority takes great pains to "legalize unlawful police conduct" by overlooking it or wishes for the "expansion of police powers beyond what the Constitution allows."

Writing cynically this year in a landmark ruling allowing government access to private e-mail traffic without prior notice, Martin said "heaven forbid" that the majority should require the government "to abide by the mandates of the Bill of Rights." Judge Jeffrey S. Sutton, a Bush appointee, fired back, calling the criticism "a bit overwrought." The majority, he wrote, had no intent to degrade civil rights, only to rule on the facts at hand.

When Bush sought this year to summarize the fruits of his judicial appointments, he chose to do it here in Cincinnati, at an October meeting of the local chapter of the conservative [Federalist Society](#). "Judges matter," Bush said, explaining that his nominees were selected because they would "not use the courts to invent laws or dictate social policy." They should, he said, "exercise their power prudently, cautiously or, some might even say, conservatively."

The 16 judges on the 6th Circuit have the final voice in nearly all federal appellate litigation in Michigan, Ohio, Kentucky and Tennessee, deciding more than 2,700 cases a year. Although Bush's seven appointees to the circuit almost always vote together, only two attracted any controversy during confirmation hearings on [Capitol Hill](#), while the rest were approved by voice vote or tallies of 95 or 96 to 0.

"Democrats [in Congress] don't care about this issue" as much as Republicans do, said [Nan Aron](#), president of the liberal [Alliance for Justice](#), a coalition of more than 70 groups that lobbies against conservative judicial appointments. "They didn't under Reagan, and they don't care today."

[Senate Judiciary Committee Chairman Patrick J. Leahy \(D-Vt.\)](#) has said his panel carefully vets all nominees. He has boasted that the committee has treated Bush's nominees "more fairly than Republicans treated President Clinton's" and has successfully halved the number of federal judicial vacancies at the beginning of Bush's term by acting speedily on nominations.

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One of the exceptions to the mostly unanimous support was Sutton, who attracted 45 negative votes. Today he is the intellectual engine behind some of the majority's more controversial rulings. Sutton, a former chief solicitor for the state of Ohio, attracted conservative support before his nomination by consistently pressing for states' rights and challenging enforcement at the federal level of civil rights and disabilities laws.

Sutton was the principal author of the 6th Circuit's final decision in the Arnold case, rejecting the inmate's appeal for a new trial. Arnold was arrested in 2002 after his girlfriend's daughter called 911 to say he threatened to shoot her. Arnold, a high school dropout, had spent a good portion of his adult life behind bars after convictions at age 19 for assault, at 22 for grand larceny and at 24 for murder.

His arrest for possessing a handgun -- found under the front seat of a car used by Arnold and his girlfriend -- occurred four months after he left prison. At trial, however, prosecutors presented no evidence that the gun was his, and the daughter's accusations to police were admitted at trial even though she refused to testify. She told a private investigator that Arnold had no gun, but that recantation was never disclosed to the jury.

Sutton was initially outvoted on a panel when one other Republican appointee and Karen Nelson Moore, a Democratic appointee, said Arnold's conviction was unjust.

"I finally got justice -- that's what I thought," Arnold said in a telephone call from prison.

Then the government appealed. Sutton wrote the en banc majority opinion, which in reversing the verdict said the evidentiary issues were not particularly egregious mistakes and did not seriously affect the trial's fairness.

We cannot overturn the jury's decision merely because it had to draw reasonable inferences" rather than rely on direct proof, Sutton said.

But Moore, a former law professor who once clerked for Supreme Court Justice Harry A. Blackmun, wrote an impassioned dissent that was joined by three other Democratic appointees.

They concluded that the jury had an absolute right to know that the daughter withdrew her accusation and that, as a result, Arnold should have been acquitted.

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About two weeks before the presidential election, the majority of the full 6th Circuit ruled that states are obligated under a relatively new federal law to check voter registration lists against driver's license databases and supply lists of mismatches to county workers. The decision was overturned four days later by the Supreme Court, but it typified the mostly party-line voting that has made the proceedings here among the most rancorous in the country.

Nine judges, including six named by Bush and three picked by other Republicans, prevailed over five appointed by Democratic presidents and one named by Bush at Democrats' insistence. Their decision overturned a contrary ruling by two judges named by Democrats.

Moore said in the minority dissent that the state Republican Party had sought an en banc hearing simply "to get a different result by having a different forum within the Sixth Circuit," adding that her colleagues had rashly accepted the "baseless" request in violation of federal court procedures.

Sutton responded that it was "not a normal case" because of the imminence of the election and the significance of potential voter fraud in Ohio.

The ruling was among a very few 6th Circuit decisions to have been overturned by the Supreme Court since the circuit shifted to Republican-appointee control. The other notable exception occurred in 2006, when five members of the Supreme Court decided that the treatment of Paul Gregory House -- a man sentenced to death in 1985 by a Tennessee court -- was so unjust that House should get a new trial.

House was convicted of aggravated murder at age 23 in a trial marred by sloppy police work. Years later, witnesses came forward with claims that the victim's husband had confessed to the killing; new forensic testing suggested that bloodstains found by the [FBI](#) on House's trousers came from a lab spill; and DNA technology showed that semen found on the victim's nightgown was not from House.

Four of Bush's appointees on the 6th Circuit joined four other Republican picks in a 2004 ruling that the new evidence was not powerful enough to keep a reasonable juror from convicting House in a new trial -- and the case thus did not meet a key legal threshold for reversal. But [Justice Anthony M. Kennedy](#) and four others on the Supreme Court disagreed, saying House's attorneys had presented enough new information to suggest the "actual innocence" of a death row inmate.

[Chief Justice John G. Roberts Jr.](#) and two other Republican appointees concluded in their dissent that, despite the new data, the guilty verdict was just. The state of Tennessee plans to retry House -- who has been on death row for 22 years and now uses a wheelchair because of multiple sclerosis -- in March.

As [Jonathan Adler](#), a [Case Western Reserve University](#) law professor, describes the 6th Circuit's divide: "There are several judges who believe their colleagues will do anything they can to prevent an execution, and, on other side, there are judges who believe their colleagues will do anything to grease the skids." One side, now in the minority, "thinks the other has closed its eyes to the faults

within the criminal justice system," while their opponents in the majority complain that the first camp is unwilling to let anyone be rigorously punished.

Staff researcher Madonna Lebling in Washington contributed to this report.